In my judgment, considering the evidence as a whole, it is just that this marriage should be dissolved. I order that a decree nisi be granted and in view of the fact that the respondent had indicated that he would not return to the matrimonial home and there is no prospect of reunion between the parties, I also order that this decree nisi be made absolute forthwith.

Order accordingly.

Solicitors: *Loke, Kiing & Co.*

PITTING BIN HAJI MOHAMMED ALI v. PUBLIC PROSECUTOR

[A.C.J. (B.T.H. Lee J.) February 22 & June 9, 1978]
[Sandakan — Criminal Appeal No. 30 of 1977]

Criminal Law and Procedure — Appeal — Scope of Criminal Procedure Code (F.M.S. Cap. 6), s. 307(i) — Courts of Judicature Act, 1964, s. 51(2) — Criminal Procedure Code (F.M.S. Cap. 6), s. 307(i) & (iv).

Firearms and Explosives — Appellant charged with carrying a firearm and explosives without permit or licence — Contravention of s. 13(1) of Firearms and Explosives Ordinance, 1956 — Appeal under s. 307(i), Criminal Procedure Code.

The appellant in this case was charged and convicted for carrying a firearm and explosives without a permit or licence in contravention of section 13 of the Firearms and Explosives Ordinance, 1956. He appealed. The petition of appeal was however lodged by the advocate for the appellant. The learned Deputy Public Prosecutor raised the objection that there was no proper appeal under section 307 of the Criminal Procedure Code. Section 307(i) reads as follows: "... any person who is dissatisfied with any judgment, sentence, or order pronounced by any Magistrates Court in any criminal case or matter *to which he is a party* may prefer an appeal...." and section 307(iv) states: "within ten days after the copy of grounds of decision has been served as in the last preceding subsection provided, the *appellant shall lodge*... a petition of appeal...."

Held: (1) the appeal ought to be dismissed by reason of the appellant's complete failure to conform with the provision of section 307(iv);

(2) it is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground or objection for a possible appeal;

(3) the prohibition contemplated by the provisions of the Firearms and Explosives Ordinance, 1956 is absolute and there was no obligation on the part of the prosecution to prove *mens rea.*

Cases referred to:-

(1) *Municipal Commissioner, Malacca* v. *Teh Chwee Swi* [1971] 2 M.L.J. 274.
(2) *R.* v. *McReady* reported in the *London Times* dated March 11, 1978.
(3) *Muthusamy* v. *Public Prosecutor* [1948] M.L.J. 57.
(4) *Jusoh Bin Awang* v. *Public Prosecutor* [1950] M.L.J. 69.
(5) *R.* v. *Chua Eng Hong* [1937] M.L.J. Rep. 247.
(6) *R.* v. *Stirland* 30 C.A.R. 56.
(7) *Sulong Bin Nain* v. *Public Prosecutor* [1947] M.L.J. 138.
(8) *R.* v. *Faulkner* [1972] 56 C.A.R. 594.
(9) *Marimuthu* v. *Public Prosecutor* [1974] 2 M.L.J. 145, 146.

CRIMINAL APPEAL.

Abdul Razak Rouse for the appellant.

Abdul Wahab Patail (Deputy Public Prosecutor) for the respondent.

B.T.H. Lee J.: The appellant was charged with two counts for carrying a firearm and explosives respectively without a permit or licence in contravention of section 13(1) of the Firearms and Explosives Ordinance, 1956 (No. 17 of 1956) (hereinafter called "the Ordinance").

The appellant claimed trial and was represented by counsel. In the event he was convicted and sentenced in respect of the First Charge to three (3) months' imprisonment and fined $2,000, in default one (1) month's imprisonment; and in respect of the Second Charge to two (2) months' imprisonment, the sentences to run consecutively. Against these convictions and sentences the appellant has now appealed on a number of grounds.

A preliminary point was raised by the learned Deputy Public Prosecutor grounded on the provisions of section 307 of the Criminal Procedure Code (hereinafter referred to as "the Code") alleging that there was no proper appeal before this court. The right of appeal is given by section 307(i) of the Code which, omitting the irrelevant parts, reads as follows: —

"... any person who is dissatisfied with any judgment, sentence, or order pronounced by any Magistrate's Court in a criminal case or matter *to which he is a party* may prefer an appeal...."

and section 307(iv) provides that —

"within ten days after the copy of grounds of decision has been served as in the last preceding subsection provided, the *appellant shall lodge*... a petition of appeal...."

It was contended by the learned Deputy that counsel or advocate for the petitioner in the Petition of Appeal is not such a person. The only provisions of the law which the court is able to discover where "appellant or his advocate" appears are to be found in section 307(ii) and (iii) of the Code.

Section 307(ii) speaks of notices or documents connected with the appeal which may be served upon the appellant or upon his advocate, and section 307(iii) provides a copy of the grounds of decision to be served upon the appellant or his advocate.

In support of the learned Deputy's argument, the case of *Municipal Commissioner, Malacca* v. *Teh Chwee Swi*[1] was cited. In that case the Municipal Commissioner presented an appeal to the High Court. The issue there was the question whether having regard to the provisions of section 307 of the Code it can be said that the Commissioner could file an appeal in his own name and right. It was there held that since the Public Prosecutor is the only person who could have appealed, the appeal then before the court was incompetent and consequently dismissed.

Counsel for appellant however cited section 51(2) of the Courts of Judicature Act, 1964, in support of the view that counsel may appeal on behalf of an accused person. Section 51(2) is in these terms: —

"Every notice of appeal shall state shortly the substance of the judgment appealed against, shall contain an address at which any notices or documents connected with the appeal may be served upon the appellant or upon his advocate, and except where the notice of appeal is given orally under section 54, shall be signed by the appellant or his advocate."

So far from that being shown in appellant's favour,

the section apparently lends support to the prosecution's argument.

It was vaguely suggested by counsel for the appellant that the court ought to read into the words "the appellant" in section 307(iv) the words "or advocates for the appellant". I do not think that any such construction can properly be adopted. So to read the provision appears to me to read into it a great deal that is not there.

In the recent case of *R.* v. *McCready*[2] the appellant's solicitors learned of the ground on which the appellant was appealing that he could not be found guilty of the count charged. They decided to advise an appeal but could not get in touch with the accused person. They completed the form "on behalf of the appellant" but the court could not consider appellant's case. The court there held that solicitors had no implied authority from their clients to appeal against any order of the court.

On this point alone, I think the appeal ought to be dismissed by the appellant's complete failure to conform with, indeed in defiance of, the provisions of section 307(iv). Having regard to this conclusion on the main issue in the appeal, it is strictly unnecessary to consider the other points raised but in the circumstances of the case and having regard to the general importance of some of the matters discussed, I propose to deal shortly with these points.

It was objected that failure on the part of the lower court to find out if counsel for appellant had any questions to ask of witness PW5 after the witness had been examined in chief had prejudiced his client, and in support of his argument cited the case in *Muthusamy* v. *Public Prosecutor*.[3] The short answer to this is that PW5's evidence was read over to him (see page 9 of Record): —

"*Prosecution*

I have intention of impeaching the credit of witness by referring to statement made to the Magistrate on May 17, 1976 on facts relating to the gun....

(*Court* reads out relevant portion of statements given by PW5 before Magistrate Chin Tai Kong on May 17, 1976 as follows):

'After that Pitting took his two shotguns and asked me to hand over my rifle to him. I refused, telling him that I had already shot someone with it, not knowing whether that someone was dead or alive. It was difficult to hand the rifle to him. He then pulled his pistol and pointed it at me and told me to hand over the rifle. Then I handed over the rifle.'

PW5

I agree I made the statements before the Magistrate."

Similarly, after the conclusion of the cross-examination of the accused DW1, counsel for appellant did not re-examine DW1 nor did he raise any question as to the propriety of the procedure adopted by the learned Magistrate. It is unnecessary except in the briefest summary to mention the relevant parts of the evidence of DW1, the accused person. He said (at page 18 of Record):

"I saw a gun lying outside Balai Raya Kampong Upak. I took it and the ammunition and put them in the room as Salillah was not there... I kept the gun for security.... Subsequently when we reached Mile 17 I wrapped it with the plastic and buried it under one of the rambutan trees.... The plea by Commissioner of Police was through radio, T.V. and newspaper.... I had a licence to hold a shotgun and shotgun bullets... I have no licence to carry any other gun or ammunition... I am not exempted from holding a firearm without a licence.... After leaving Pulau Upak I was at Mile 17 until August 12, 1976. I know all the time the police were looking for me.... I finally decided to surrender myself after many months in the wilderness... I took the gun because I was scared the wild boar might dig it out looking for earthworm."

In cross-examination, accused person said (at page 20 of Record): —

"...I did not bury shotgun because I knew it was lawful for me to carry it. I buried the rifle because it was heavy for me to carry 2 guns for 24 hours.

After leaving Pulau Upak I was at Mile 17 until August 12, 1976. I know all the time the police were looking for me. ...I finally decided to surrender myself after many months in the wilderness and after situation has cooled down on August 12, 1976."

The accused denied having surrendered because he knew police was hot on his trail. He also denied that by reason of his uncooperative attitude he had no choice but to surrender.

And at page 21 of Record: —

"*Prosecution*

Did you make these statements? (Statement underline read out)

'Before our departure, Salillah gave me his .303 rifle and 20 rounds of ammunition.'

DW1

I did make the statement before ONG NAI BOON. My signature is on the statement.

Prosecution

Since witness admits to making the statement, I do not need to prove."

It is to be observed that in this case accused was represented by experienced counsel. Counsel was present in court. No point was raised, no objection taken.

In my opinion that goes to show that counsel who after all listened to the evidence when it was given had placed the same construction upon it as the lower court had placed upon the admission by the witnesses of the statements read out to them. The court has to decide the matter on the material before it. It does show that the discrepancy which occurred was actually read out to the witnesses PW5 and DW1. Both admitted to have made the statements which were read out and each gave his own explanation as to the discrepancies.

It is my view clear that strict proof of the previous statements is necessary where the making of the statement is denied, not when it is admitted. It is for the witnesses PW5 and DW1 to explain if they can the alleged discrepancies, and it is for the court to consider (which it did so in the instant case) whether or not the explanations given were satisfactory. (See *Jusoh bin Awang* v. *Public Prosecutor*[4] and *R.* v. *Chua Eng Hong*[5]).

A case of prejudice to the defence would in my opinion have been made out if counsel for the appellant had been denied the right to cross-examine PW5 or to re-examine DW1 or where having asked for such right to cross-examine or re-examine it was met with a blank refusal by the court. Coincidence is said to have a long arm, but it is not indefinitely extendable to cover two instances where defence counsel failed

to cross-examine in one case PW5 and to re-examine DW1 in the other. That counsel for the appellant had failed to do so with two witnesses in the instant case seems to me to be clear on the record and I hold that this contention of his also fails.

It is perhaps right to observe here that it is not a proper use of a counsel's discretion to raise no objection at the time in order to preserve a ground or objection for a possible appeal. (See *R.* v. *Stirland*[6]).

Next, the Court of Appeal decision in *Sulong bin Nain* v. *Public Prosecutor*[7] also involving the carrying of firearms and ammunition has been cited by both counsel. In that case, the offence was under section 3 of the Public Order and Safety Proclamation (briefly referred to as "the Proclamation") which reads: —

"3.(1) *Any person who carries arms* shall on conviction be punishable with death or with penal servitude for life or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine....

(2) The Officer Commanding the Civil Affairs (Malaya) Police Force may in his discretion by Permit in writing exempt any person from the provisions of this section."

Section 13(1) of the Ordinance under which the appellant is charged reads: —

"13.(1) Subject to the provisions of section 17, *no person shall have in his possession or carry or use any firearm or explosive* except under a licence or permit....

16. *Any person who possesses, carries or uses any firearm or explosive* except under a licence or permit..."

It was contended by counsel for the defence that to equate and fasten strictness of section 13 of the Ordinance with section 3 of the Proclamation is wrong. *Sulong's* case, he says, was during the emergency, and the facts of that case are entirely different from those of the present and as such that decision can have no application here. There is no doubt of course that that distinction between the two cases does exist, but on consideration I cannot think that that distinction makes any difference in principle.

It seems clear that the prohibition contemplated by the provisions of the Proclamation and the Ordinance above referred to is absolute. The legislature rightly regarded carrying arms without a licence as one of the serious evils in society. The possibility of chaos and disorder that uncontrolled arms possession may cause in our country needs no emphasis. It is for this reason that the statute prohibits absolutely the acts defined as constituting an offence, in the sense that there is no obligation on the part of the prosecution to prove *mens rea*, if the events postulated in the sections occur.

I can see nothing in PW5's evidence nor in the appellant's testimony which brings the appellant's case within the ambit of either section 76 or 79 of the Penal Code.

That accused person belonged to the disciplined force and had been employed as a police officer from 1965 to 1973, totalling some eight years, has been established in evidence.

And there is the very significant circumstance in which the accused on his own showing said that he did not bury the shot gun because he knew it was lawful for him to carry it, but buried the rifle for which he had no licence.

If anything, the possession by accused for nearly three months both of the rifle and the ammunition, and his position as a police officer makes the offence the more serious. And there is nothing in the evidence of either DW1 or PW5 that contradicts the prosecution case.

The existence of a *bona fide* intention, or a technical act done in good faith is in my view no answer to the charge but is a matter only for mitigation of the penalties that may be imposed but not to the guilt itself.

That consecutive sentences passed for possession of arms and ammunition were justifiable and proper is supported by the decision in *R.* v. *Faulkner*.[8] (See also *Marimuthu* v. *Public Prosecutor*[9]).

For each and all these reasons I have given, I can find nothing in the law or in the authorities to which the court has been referred to justify the conclusion to which the counsel for appellant invites me to come. The appeal is accordingly dismissed.

Appeal dismissed.

Solicitors: *Rayner & Co.*

SALLEHUDDIN BIN YAHYA v. PUBLIC PROSECUTOR

[O.Cr.J. (Tan Chiaw Thong J.) October 26, 1978]
[Sibu — Criminal Application No. 6 of 1978]

Dangerous Drugs — Indian hemp — Possession of — Prosecution must prove that it was Indian hemp within meaning of Dangerous Drugs Ordinance — Dangerous Drugs Ordinance, 1952, ss. 2 & 6.

Criminal Law and Procedure — Application to reserve questions of law for Federal Court — Scope of s. 66(1) & (6)(a) of Courts of Judicature Act, 1964 — Court's discretion — Retrial — When retrial may be ordered — Criminal Procedure Code (F.M.S. Cap. 6), s. 316 — Dangerous Drugs Ordinance, 1952, ss. 2 & 6 — Courts of Judicature Act, 1964, s. 66(1) & (6)(a).

The applicant in this case was charged in the lower court with possession of Indian hemp. The Government chemist gave evidence in court that he analysed the contents of 40 of the 198 rolls handed to him for analysis and he found them to be cannabis. He further stated that cannabis was also known as Indian hemp and also known as ganja. No one involved in the trial took the trouble to ascertain from him whether the Indian hemp mentioned by him was that which falls within the definition of "Indian hemp" in section 2 of the Dangerous Drugs Ordinance.

The applicant applied under section 66(1) and (6)(a) of the Courts of Judicature Act, 1964 to have reserved for the decision of the Federal Court alleged questions of law of public interest which had arisen in the course of the appeal of the applicant against his conviction.

The court ordered a re-trial and the applicant argued that it was in conflict with authorities cited.

Held: (1) section 316(b) of the Criminal Procedure Code gives an appellate court a discretionary power in suitable cases to order a retrial;

(2) in a trial of this sort, when the substance analysed was described as Indian hemp by the expert witness, he should have been asked to clarify whether the Indian hemp